Indiana Law Journal

Volume 72 | Issue 4 Article 6

Fall 1997

What Is Law? A Search for Legal Meaning and Good Judging Under a Textualist Lens

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"[J]udges in a real sense 'make' law.... [T]hey make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be."[1]

INTRODUCTION

What is the law? In the above quotation, Justice Scalia does not reveal what the law is. He does, however, supply us with an insight into what the legal process is like. We can infer that the actors who decree today's and tomorrow's law come from a legislature that makes law as legislators make it. Generally, for the United States Congress, this involves an extensive bout within committees of both the House of Representatives and the Senate, a favorable majority vote on the floors of each respective body (perhaps after a conference committee irons out the differences between the two), and presentation to the President for signature. A bill that survives these essential formalities becomes law, or more formally, a statute.

Presumably, judges "find" the law leftover after the legislative wheels stop spinning. But what is there to find? After all, there is a statute. The judge charged with interpreting it and the agency charged with enforcing it each have access to a copy. Clearly there is more to finding law than being able to locate and read a statute. The statute has legal effect because it passed the formal requirements for statutes, but the law that a statute stands for is somewhere to be found. The question then is how do judges find law? Statutory interpretation is the subject that offers an answer.

There are numerous ways to interpret a statute. A judge charged with the task of finding law may adhere to a multitude of labels: purposivism, intentionalism, textualism, structural textualism, or even hypertextualism. A purposivist judge finds law by measuring a statute's language against the statute's purpose. For the task of discerning purpose, legislative history is a common choice. An intentionalist finds law by reconstructing congressional intent, also frequently relying on legislative history. Intentionalism differs from purposivism because a statute can be interpreted to have a broader purpose beyond the one intended. A textualist finds law by defining the words of a statute in accord with their ordinary or plain meaning. Dictionaries and canons of construction are often helpful tools in this pursuit. A structural textualist finds law by examining the words not only in their ordinary sense, but also by looking at the structure of the

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1. James B. Beam Distilling Co. v. Georgia, 501 U.S. 525, 549 (1991) (Scalia, J., concurring) (emphasis in original).

statute as a whole, for example, by asking whether one definition is more consistent with the surrounding terms or provisions than another definition, or is consistent with the statute's stated purpose. Both of these forms of textualism are dependent on the "internal context" or rules of the statute, including the statute's grammar; this in contrast to the purposivist approach which regularly relies on "external context"—for example, the intent of the legislature. Finally, a hypertextualist finds law by utilizing the tools of the other forms of textualism, as well as by resorting to analysis of other statutes, as if statutes in general were a reference guide or a kind of dictionary for the meaning of legal words. For instance, an unclear usage of a word in one statute may become clear by comparing how the word is used in another statute. For the hypertextualist, statutes as such provide a background for interpretation.

Despite the terms "structural textualism" and "hypertextualism," there are really only two major strands of thought on interpretive questions: that between the textualist (which will be deemed to include both structural textualism and hypertextualism) and the purposivist. The dividing line between them is that of internal and external context. While there are occasions where a purposivist might rely solely on external context, ignoring a clear statutory text,[2] generally speaking, for textualists and purposivists alike, the text is a solid and legitimate focus. The difference between the two schools of thought is that for textualists the text should also be the *only* focus. This is so because, textualists claim, the consequences of a purposivist, external context approach to interpretation for our constitutional democracy and for the rule of law are grave.[3]

Justice Scalia is an outspoken proponent of the textualist view and also of the dangers of purposivism, an approach he considers erroneous, particularly when combined with judicial rummages through legislative history.[4] Not coincidentally, since Justice Scalia's appointment to the Court, the legal academy resuscitated its interest in issues of statutory interpretation.[5] Today there is an

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2. This is sometimes the case, particularly if a statute's plain or literal meaning leads to an absurd result. The "Golden Rule" of statutory interpretation is that the ordinary or literal meaning of a text may be overlooked if it would lead to an absurd result. Justice Scalia describes the rule as one of the traditional tools of statutory interpretation, one which involves judicial choice over competing policies. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511. For examples of Justice Scalia's willingness to use the Golden Rule, see his concurrences in Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) and K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 324 (1988).

3. Concerns about using non-textual sources in judicial interpretation form the center of the normative component of textualism. The argument is that a judge *should* not rely on external context because doing so will result in a form of judicial lawmaking that violates the separation of powers.

4. *See* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407 (1995) (Scalia, J., dissenting); City of Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994); Landgraf v. USI Film Prods., 511 U.S. 244 (1994); Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) (Scalia, J., concurring); H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) (Scalia, J., concurring).

5. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12

abundance of scholarly literature in the field[6] and prominent judges have joined the textualist-purposivist debate.[7]

Despite the rhetoric about the importance of getting statutory (or for that matter, constitutional) meaning precisely right, the purposivist-textualist debate is one that could strike some readers as more appropriate for philosophers than legal professionals or judges, especially when books and articles retreat into the abstract pontifications of Gadamer, Wittgenstein, and Schleiermacher. Furthermore, the insistent and vehement viewpoints defending one approach over another prompt a reader to ask how advocates of one approach or another can take themselves seriously. Textualism, for example, has some obvious practical weaknesses. Problems with a plain meaning rule seem so self-evident as to prompt the query: why bother, either with the rule, or with the critique? And yet the Justices do bother. They cite plain meaning with increasing frequency.[8] They wield dictionaries at a laughable rate.[9] The circus over the meaning of words forces a Court watcher to ask whether the question of meaning has become too complicated and modern day statutes too technical and detailed to trust that nine

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CARDOZO L. REV. 1597 (1991).

6. *See* Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749 (1995); William D. Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992); Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585 (1994); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321 (1995).

7. For example, Judge Easterbrook of the Seventh Circuit is a textualist. For a summary of his views, see Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994). Judge Wald of the D.C. Circuit, however, is critical of the textualist structural approach. *See* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990). Justice (then Judge) Breyer noted the decreasing use of legislative history in Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992). Chief Judge Mikva of the D.C. Circuit argued against original intent in Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979 (1990). Judge Posner of the Seventh Circuit set out a theory of imaginative reconstruction in RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).

8. In the 1993 spring term, over one in five cases decided with an opinion involved a dispute over plain meaning. For a list of the cases, see Taylor, *supra* note 6, at 356 n.162. Textualism's use of the plain meaning approach means that more cases are decided on this basis. For an analysis of the likelihood of congressional override of plain meaning decisions, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (finding that most Court plain meaning decisions are not overridden).

9. *See* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438-39 (1994). Recent examples of dictionary use on the Supreme Court are plentiful. *See* MCI Telecomm. Corp. v. AT&T, 512 U.S. 218 (1994) (Justice Scalia uses four dictionaries to help define the word "modify."); Smith v. United States, 508 U.S. 223 (1993) (Scalia, J., dissenting) (countering Justice O'Connor's use of dictionaries to define "use" with dictionaries of his own).

Justices will make a better decision than nine laypersons selected at random.[10] A reader of Supreme Court cases, particularly in the field of statutory interpretation, will be struck by how immature the Justices sometimes seem, and how easily the debate over the meaning of a word quickly descends into what reminds the reader of a stereotypical, academic nitpick. Is the textualist-purposivist debate moot, or do the biting remarks and forceful language mask a much larger argument? Like lovers who know one another so well that a seemingly insignificant spat masquerades disagreement about divergent personal views, perhaps the Justices are immersed in an argument over similarly fundamental ideas about the meaning of law.

Part I of this Note explains that the debate, and for that matter statutory interpretation, is important. The debate is not simply about how to find the law,[11] but is about determining what the law is. Part II demonstrates that textualism is not just about the meaning of words. It is primarily a normative theory about the good judge and the role a judge should have in our constitutional democracy. Part II shows that textualism's identity of the good judge with a particular method of interpretation is mistaken. Part III then reveals that textualism as a theory of meaning, as personified by Justice Scalia, is incomplete. The theory of intent underlying textualism is problematic and leads to a confused conception of meaning. Meaning cannot be determined by rules as textualists claim. Thus, although textualism is offered as a remedy for bad judging, textualism's mechanical methodological approach to meaning not only fails to prevent poor judging but promotes it.[12] Finally, Part IV illustrates the problems of textualism via the confused case history of *Babbit v. Sweet Home Chapter of Communities for a Great Oregon*.[13] *Sweet Home* shows both the importance of statutory interpretation, the inevitability of the fact that judges are part of the political process, and the unfortunate but perhaps also inevitable ambiguity that is the law.

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10. The reference is to Justice Scalia's suggestion in *Cruzan* that the Justices were no more qualified than nine people selected at random from a phone book, though the context that prompted the remark was on the qualification of judges to determine whether there is a right to die. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 293 (1990) (Scalia, J., concurring).

11. This is not to suggest, however, that finding the law is simple. The task is a complicated and intricate one as Justice Scalia would confirm. *See* Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991).

12. Although this Note argues that there is not one best method of approaching statutory meaning—other than to apply, quite seriously, the precept: "do your best and be a good judge"—it does not follow that the arguments about how to interpret a statute are moot. They are not moot because statutory interpretation is in fact about something other than the meaning of words. The themes that run through all the debates are of very big ideas: namely, the role of the judge and the nature of the legal process. Indeed, underlying all statutory interpretation issues is the question: What is law? Textualism has had a demonstrable impact on this question.

13. 115 S. Ct. 2407 (1995).

I. STATUTORY INTERPRETATION AND TEXTUALISM AS A REACTIONARY THEORY

What does it mean to interpret a statute? Generally, the fact that judicial interpretation is often necessary could mean that the law as it left the legislature was only partially complete. To put it another way, a statute as such is no more than the legislative form of law; the interpretation of it is another, judicial form of law. Or, interpretation could instead resemble a more neurological process of understanding and articulating what is written, like a brain making sense of the noise we call speech.[14] In the legal setting, this process would be like one of translation: from the legislative language to the judicial language, a difficult task to be sure, but one that does not require judges to use interpretation as a form of lawmaking.

There is little doubt that Justice Scalia thinks of statutory interpretation as a form of construction. He often presents the issue in conclusory terms. For example, at the beginning of his dissent in *Chisom v. Roemer* he stated: "Section 2 of the Voting Rights Act of 1965 is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination. *It is a statute.*"[15] Justice Scalia's emphasis on the fact that "it is a statute" shows that he thinks of statutory interpretation as nothing more than applying the law, as it has been given, to the facts. For him, nothing more need be said, it is a statute, no more no less. As another example, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, Justice Scalia described his antipathy to retroactive legislation because conduct should be assessed "under the law that existed when the conduct took place."[16] In each instance, Justice Scalia asserted a truism: judges apply statutes, they apply the law as it exists. While this may be true, it does not take us very far because it is not clear what law does exist. Nor is there an easy, definitive answer to what it means to interpret a statute.

Like the meaning of words, statutory interpretation is contextual. In order to understand the meaning of a word, one looks to the context in which the word was spoken. Similarly, for statutory interpretation, in order to understand what it means to interpret a statute one should look to the context in which it occurs: the process of lawmaking. The process begins in Congress. Congress eventually produces the text of a statute. If an agency administers the statute, then the agency, subject to oversight by the Congress and to judicial review under the *Chevron* standard,[17] applies the law according to its interpretation of what the statute means. Whether filtered through an agency or not, whenever a case reaches the Court, the Court becomes an actor in a part of the process through which law is made. The Court then chooses among conflicting versions of the law of the statute (for example, the congressional version, the agency version, the

14. Textualists call this "construction" and would prefer that judges construct the law rather than interpret it. *See infra* text beginning at note 70.

15. 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (emphasis added).

16. 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

17. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The *Chevron* standard will be discussed *infra* text beginning at note 95.

version as applied by lower courts, etc.) and does not, as Justice Scalia suggests, find the law that always existed. Furthermore, the judicial choice is not arbitrary but depends on context. It occurs before a background or a legal landscape that includes factors such as the mischief to which the statute is directed; the broader purpose of the statute; and the political, social, moral, and legal traditions of the polity.[18] Literally, when considered without such a background, a "statute" is no more than a text filled with combinations of letters and figures.

Justice Scalia would quite simply disagree. Or to put it differently, he might agree that a statute is borne of many external considerations, but that after the formal requirements of making a statute are met, their relevance ceases.[19] This view results from a formalist application of the doctrine of separation of powers. The textualist would say that the doctrine of separation of powers means precisely what it says: the judicial power is separate. Use of external context is relevant, they say, for the legislative political process; but because of the separation of powers what is relevant for the legislature is not necessarily so for the judiciary. The separation between the legislative and judicial constrains the textualist's understanding of statutory interpretation. Judges are not part of a wholistic lawmaking enterprise but rather are atoms serving to translate the law as it exists for those unable to understand it. The judge's separate existence is decidedly not a political one.

While the textual approach to meaning may honorably intend to be an apolitical approach to law,[20] an uncomfortable fact remains. Textualism is, in one sense, law by revelation.[21] The textualist finds law as it always existed once the statute was passed. This is a necessary textualist fiction, necessary because if meaning were not fixed in time interpretation must then account for the passage of time and consequently for the change in the meaning of the law. Thus for the textualist the words of a statute are like the numbers in an equation. They have *a* meaning. But while it may be true to say that words as such are not inherently ambiguous, words are used by persons and insofar as a person's intentions are not clear, the fit between word and intent will always leave a space for ambiguity. Thus, there is always some room for an interpreter to decide what words mean. The consequences for the political process are huge because as judges choose meaning, they make law; and as they make law they affect policy.

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18. *See* 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 58-62 (1765); REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975) (objecting to the use of external context in interpretation). For a general discussion about the context of Statutory interpretation, see WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS, ch. 10 (1993).

19. Justice Scalia's formalist argument is based on the bicameral and presentment clauses of the Constitution, U.S. CONST. art. I, § 7, cl. 2-3, as well as the Court's decision in INS v. Chadha, 462 U.S. 919 (1983) (declaring the legislative veto unconstitutional). For a thorough criticism of his argument, see Eskridge, *supra* note 5, at 671.

20. For analysis concluding that in criminal procedure, Justice Scalia's results are due more to method than political conservatism, see Jerry L. Marshaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827, 835 (1991).

21. For an interesting approach to Justice Scalia's constitutional jurisprudence as a product of his personal Catholic background, see George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

The textualist apolitical ideal is impossible. As Richard Pierce laments, hypertextualism "find[s] linguistic precision where it does not exist, and rel[ies] exclusively on the abstract meaning of a particular word or phrase even when other evidence suggests strongly that Congress intended a result inconsistent with that usage."[22] These practices mean that a textualist makes an uninformed choice with potentially disastrous results.[23] Pierce is not alone in concluding that textualism has had an effect exactly opposite to the goals it set itself, those of limiting judicial discretion and removing the judge from the political process.[24]

Despite such consistent criticism, textualism has remained prominent and influential.[25] This is because the textualist case is largely a reaction to interpretive practices in the 1970s. During that decade, purposivism was a predominant means for deciding cases and it came under heavy attack. Judges were accused of selectively using legislative history to support a version of legislative intent that fit with the judge's own policy preference.[26] The censure of purposivism arose largely because the reigning theory of the political, legislative process ("legal process" theory, as espoused by Hart and Sacks), that the legislature consisted of reasonable people pursuing the public interest, collapsed.[27] Under legal process theory, in order to discover the intent of the legislature, a judge merely had to adopt the position of a reasonable public servant and then conclude what policy result would have been intended by such a person.[28] This theory of the rational legislature pursuing an observable public interest made purposivism an acceptable method of interpretation. Under it, legislative history was a form of food for the imagination.

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22. Pierce, *supra* note 6, at 752. He also credits hypertextualism with "ignoring statutory inconsistencies created by the 'plain meaning' attributed to a particular provision; . . . ignoring agency arguments that its construction was important to its ability to further a statutory goal; and . . . ignoring the settled expectations of affected private parties and other government institutions." *Id.* at 754-55.

23. See *id.* at 766 for Pierce's discussion of *Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

24. *See* Spence, *supra* note 6, who argues that textualism leads to an increase in judicial discretion and a greater potential for abuse of the separation of powers and the political process; Wald, *supra* note 7.

25. Textualism's use of the plain meaning approach means that more cases are decided on this basis. For an analysis of the likelihood of congressional override of plain meaning decisions, see Eskridge, *supra* note 5.

26. *See* Pierce, *supra* note 6, at 751; Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983). Justice Scalia was an early critic of such practices. While sitting on the D.C. Circuit, he criticized the use of committee reports as authoritative evidence of statutory meaning because they were created by staff, were not necessarily read by the legislators themselves, and were subject to packing by interest groups and other insiders. Hirschey v. Federal Energy Regulatory Comm'n, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring). For a critique of Justice Scalia's criticism of legislative history, see Farber & Frickey, *supra* note 5. Justice Scalia's criticism continues and is well documented. *See* Scalia, *supra* note 4.

27. HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1411 (tentative ed. 1958).

28. *Id.* at 1414.

Eventually, the idea that Congress worked in one voice fell under the more cynical but less naive eyes of public choice theorists. Public choice theory replaced the legal process model with a more realistic attitude toward legislation—that it was a product of infinite bargaining and compromise—and a much more critical approach to the notion that a legislature had any intention at all.[29] Under the public choice model, if the purpose of interpretation was indeed for judges to effect the intent of the legislature, they would be engaged in an incredible task of divining the intent of a legislature that consisted of little more than the sum of the individual votes of its members, where each member's vote was an asymmetrical product of constituent pressure, personal desire, partisanship, and any other number of factors. Thus, this view of the legislative process meant that judges should not be concerned with the intent of the legislature unless they were prepared to accept the charge that their judgment was in effect arbitrary and a usurpation of legislative power.

This cursory history is necessary to show why textualism rose to counteract the old theory of the legislature and legislative intent. The textualists essentially draw an interpretive line at the text, thereby disregarding purpose. The purposivist-textualist debate continues, however, because it is hard to determine meaning without acknowledging the existence of a purpose. For the textualist, an author's (or legislature's) intent is not important, except as it is stated in (or, under a structural approach can be implied from) the document.[30] This means that if a statute's purpose *is* clear from the legislative history but not clear from the text, the textualist will methodically adopt the textual reading.[31]

In addition, the debate continues because textualists often provoke debate by insisting that resorting to legislative history is illegitimate and against the structure of the Constitution.[32] Justice Scalia, for example, rejects the use of legislative history outright and says he instead looks to the traditional means of statutory construction like the plain meaning rule.[33] However, legislative history and the task of effecting the intent of the legislature are as traditional as the plain meaning rule. Furthermore, the Constitution says nothing about the method of interpretation judges are supposed to use. And as the landmark *Holy Trinity* case spelt out: "It is a familiar rule, that a thing may be within the letter of the statute

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29. *See* Zeppos, *supra* note 5, at 1602. The literature on the public choice theory is enormous. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) and Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982). Justice Scalia sketches his (public choice) view of the legislative process in Edwards v. Aguillard, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting).

30. *See* Scalia, *supra* note 2, at 517 (criticizing the search for legislative intent as a "wild-goose chase").

31. Unless, of course, there is an absurd result. *See supra* note 2.

32. *See supra* note 3.

33. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (Scalia, J., concurring). Justice Scalia criticized the majority's use of legislative history and relied instead on the traditional tools of statutory construction.

and yet not within the statute, because not within its spirit, nor within the intention of its makers."[34]

Justice Scalia's selective use of tradition cannot effectively erase more than a century of considering the "spirit" of legislation. The purposivist tradition is not easy to overcome. The eminent Learned Hand was a purposivist and took a critical view of a purely textual approach. His oft-quoted statement in *Cabell v. Markham* is worth repeating:

> Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[35]

The gist of Judge Hand's comment has been recited at least since the time of Blackstone. Listening to textualists decry purposivism and the use of legislative history as illegitimate would lead one to conclude that not only Learned Hand and Blackstone were categorically mistaken but that they are historical exceptions. To the contrary: immediately prior to the "new" textualism, the usual approach was one of a soft plain meaning rule and use of omnibus legislative history.[36] In fact, in the tradition of *Holy Trinity*, both the Warren and Burger Courts utilized legislative history in most of the leading plain meaning cases.[37]

Today's textualism is a response to some of the abusive practices of that era and should be understood in that context, that is, as a part of the evolution of the interpretive art. It attempts to cure the problem posed by the question of what it means to interpret a statute by suggesting that interpretation is not necessary and that certain traditional means of interpretation are not legitimate. But the cure, like the law, is not so simple. Interpretation often is necessary because, as later Parts of this Note will show, the text cannot always be successfully constructed. Moreover, the traditional tools of statutory interpretation include traditions that do not fit the textualist ideal. Textualism as a theory about statutory interpretation is in one sense akin to a judge interpreting a case. The theory, or a judge's interpretation, makes sense only when understood as part of a process. In the case of textualism the underlying process is evolutionary. It covers the development of differing attitudes about the role of interpretation in our

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34. Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892); *see also* Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989), where Justice Kennedy, concurring, attempts to limit the *Holy Trinity* rule invoked by the majority.

35. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945). Interestingly, according to Hand, today's Supreme Court offers an immature jurisprudence given its increasing reliance on dictionaries. *See* Nixon v. United States, 506 U.S. 224 (1993) where Chief Justice Rehnquist uses four different dictionaries to define the words "try" and "sole" in the Constitutional phrase: "The Senate shall have the sole Power to try all Impeachments." For criticism of the case, see *Leading Cases*, 107 HARV. L. REV. 144, 293 (1993); for other examples of dictionary use, see Note, *supra* note 9.

36. *See* Eskridge, *supra* note 5, at 626.

37. *Id.*

constitutional democracy over time.[38] In the case of the judge, the process is one of interaction among the branches of government in a diversified effort to make law.

II. TEXTUALISM AS A THEORY OF JUDGING: THE GOOD JUDGE AND THE BAD JUDGE—TEXTUALISM AND EVERYTHING ELSE

Justice Scalia maintains his adherence to textualism despite the many criticisms. He does so because textualism is more than a theory of meaning. Primarily it is a theory of judging. Textualism is tied into the formalistic notion that the separation of powers requires the judge to make law as judges make it, that is, to find it and leave it as the legislature left it. Take for example *Chisom v. Roemer*.[39]

Chisom concerned a 1982 amendment to section 2 of the Voting Rights Act. In the amendment, Congress disposed of the discriminatory intent requirement for illegal interference with certain practices and procedures abridging the right to vote. The question presented was whether judicial elections were covered by the new results oriented test,[40] and the answer depended on whether the word "representatives" in the phrase "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" was evidence of congressional intent to exclude judicial elections from coverage.[41] Justice Scalia (dissenting) differed with Justice Stevens (for the majority) about what "representatives" meant. Justice Stevens held that "representatives" included judges. As a consequence, Justice Scalia accused him of "wielding [the statute] as [he] please[d]"[42] to fight for a substantive policy, or in other words, of making law when he should have found it.

Justice Stevens's opinion began by quoting the preamble of the Voting Rights Act. He noted that the preamble "establishes that the *central purpose* of the Act is '[t]o enforce the fifteenth amendment to the Constitution of the United States.'"[43] His opinion concluded similarly, noting the Act's "broad remedial purpose."[44] Despite these overtures to the statute's purpose, however, Justice Stevens's overall argument was a textual one. For example, he made a structural argument that the two purposes of the amendment were "apparent from its text."[45] He also invoked the plain meaning rule to defeat the appellate court's

38. Textualism should also be understood as part of the evolution of the law: from a common law to a statutory era, and as a way to help accommodate this change.

39. 501 U.S. 380 (1991).

40. Before the amendment passed, judicial and other elections were covered by section 2.

41. *Chisom*, 501 U.S. at 388.

42. *Id.* at 404.

43. *Id.* at 383 (emphasis added).

44. *Id.* at 403.

45. *Id.* at 395.

construction of section 2.[46] Moreover, he took a textual approach to respondent's argument; namely, that if Congress intended to include judges within the meaning of representatives, Congress would have used the word "candidates" instead of the word "representatives."[47] This, Justice Stevens said, "confuses the ordinary meaning of the words. The word 'representatives' refers to someone who has prevailed in a popular election, whereas the word 'candidate' refers to someone who is seeking an office."[48] Thus it is easy to identify the interpretive elements of Justice Stevens's argument in *Chisom*. He relied on the purpose of the Act, the purpose of the Amendment, plain meaning, a hypertextual type of argument (where Justice Stevens noted that the statutory language was patterned after language in certain Court opinions), and an argument based on the ordinary meaning of words. It is also easy to see that the various elements do not combine neatly to form a clear method. He is neither "textualist" nor "purposivist," but he does exercise sound judgment.

However it is hard to equate absence of method with Justice Scalia's conclusion that Justice Stevens "wielded the statute as he pleased." Clearly, Justice Scalia likened use of the purposivist method with statute wielding; but what of the textualist arguments? He quibbled with Justice Stevens's use of textual methods because he thought the wrong result was reached, understanding Justice Stevens's textual arguments to be guided by a subjectively construed purpose, another form of statute wielding. Ultimately, however, whatever method is used, a reader can never know for a fact whether a method as applied produces a neutral result or whether a method is chosen because of the result it will produce. We cannot know if what Justice Stevens said is what he *really* thought. He said he relied on the text, on plain meaning, on ordinary usage, and he showed the reader that the result could be supported by such reliance. But we do not know whether he found the textual arguments convenient as means to a personal preference or not. The fear, voiced by Justice Scalia, is that a judge will be duplicitous. What *actually* occurs, the fearsome would contend, is that a judge's initial insight into a legal issue occurs from a personal viewpoint. That is, the judge mentally reaches a result before her reasoning can lead her there. The judge then selects appropriate tools from her legal tool box and produces a legally reasoned result. Like trying to divine the intent of an institution, we cannot know whether this is what Justice Stevens, or for that matter Justice Scalia, does; indeed a judge probably does not know herself.

It is here that the debate about statutory interpretation becomes meaningful at the normative level of "good judge, bad judge." A good judge is one who, in each case, approaches an issue as the embodiment of law (a bit like someone in the Rawlsian original position, shorn of personal preference, neutral, objective, and

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46. The appellate court contended that participation in the political process and the election of representatives were two separate protections, that "representatives" applied (and therefore excluded judges) only to the latter, and that the "and" dividing the two requirements should be read as an "or." This, Justice Stevens said, would "distort the plain meaning of the sentence." *Id.* at 397.

47. *Id.* at 399.

48. *Id.* at 400.

detached)[49] and lets the legal issue filter through her as if it were ingredients for a legal recipe. By contrast, the bad judge reaches a result first, then with skilled sophistry produces something that looks like law but actually is not. If adopting one theory of statutory interpretation makes for (or even guarantees) good judges and disables bad ones, then it would behoove anyone concerned about our constitutional democracy to argue strenuously for its adoption.

Justice Scalia makes such a case for textualism. He expresses concern that there are only limited checks on judges.[50] He wants, therefore, for judges to adhere to one method of statutory interpretation as a check on the bad judge. His goal is clearly set out in his response to Justice Stevens in *Chisom*:

> I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.[51]

And a little later in the opinion, he equates the bad judge with a scavenger:

> [O]ur job is not to scavenge the world of English usage to discover whether there is any possible meaning of "representatives" which *suits our preconception* that the statute includes judges; our job is to determine whether the *ordinary* meaning includes them, and if it does not, to ask whether there is any solid indication in the text or structure of the statutes that something other than ordinary meaning was intended.[52]

Thus the good judge is one who adopts a regular method for deciding cases (textualism), and who does not use preconceived ideas to determine results.

Justice Scalia's approach is far too limited. For one thing he inadvertently characterizes most judges (those who do not use the "regular method") as bad judges. For another, if a good judge is to decide a case, why should her consideration of the law be limited by method? Of course, Justice Scalia would respond that a good judge who does not adhere to the textual method, by definition, is not a good judge. Her conclusions as to meaning will, despite the best intentions, be polluted by the indeterminacy of purposivism. This, in turn, means that Justice Scalia's approach relies on the assumption that the textual meaning is determinate and that judges who use textual arguments but reach the wrong result are actually bad judges in disguise. So it is that Justice Stevens's textual arguments in *Chisom* were rhetorical. He used textual arguments as a way of shielding the purposivist habit.

As a further shortcoming to Justice Scalia's approach: what if Congress passed a constitutional amendment (that was duly ratified by the states) requiring that

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49. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

50. "The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic." Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588 (1990); *but see infra* note 53.

51. *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).

52. *Id.* at 410 (first emphasis added, second emphasis in original); *see* text accompanying *infra* notes 84-85 where, via the use of canons of construction, Justice Scalia can also be accused of scavenging.

judges exclude external context from their (explicitly relied upon) reasoning? Thereafter, all judges would be required to use textualism when deciding cases. Realistically, however, such action would not eradicate the bad judge, who would still be free to invoke the text as servant to preconceived ideas. Use of a regular interpretive method is plainly not a check on bad judging.

The problem with equating bad judging with results-oriented jurisprudence, as Justice Scalia so often does, is that doing so ignores the relevance of the word "jurisprudence" and demonstrates a naive view of what is law. The single, realistic check on judicial power is the word "jurisprudence" and it is huge. It denotes the difference between judge and politician. The politician makes law in any number of ways, always mindful of the formal requirements needed for a bill to be called law. A judge also makes law but does so through jurisprudence. The *legal* process, as opposed to the *political* one, is separate because of the way in which law is made. The separate powers make law in their separate ways. The legislature passes its version of law to the judiciary for jurisprudential consideration. The statute is then processed legally, according to precedent, established canons of construction, ordinary and technical meaning, textual context, statutory purpose, etc. So even if a judge approaches the jurisprudential process with a certain result in mind, the judge *must* nevertheless reason the result out in a legally reasonable fashion.[53] This process is the built-in check on bad judging, which should be defined either as the making of arbitrary or unexplained decrees, or as poorly reasoned *legal* opinions, but not simply as a results-oriented jurisprudence.

Justice Scalia is right to be concerned about the rule of law and the values it imputes.[54] If bad judges were free from jurisprudential constraints then the rule of law would indeed be breaking down. But they are not and it is not. Nevertheless, Justice Scalia's rallying cry to the text is still a crucial one because of the importance of maintaining standards of judicial reasonableness when making law. As many commentators have indicated, judicial use of legislative history can be and was being abused, casting a spell of illegitimacy on the *legal* process.[55] This is what Justice Scalia wants to counteract. Thus he attempts through textualism to determine *a priori* what it means to be legally reasonable. But as the following analysis of his dissent in *Chisom* suggests, it is hard to accept Justice Scalia's version of legal rationality as the correct one.

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53. As Benjamin Cardozo commented:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life."

BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921) (quoting 2 FRANÇOIS GÉNY, METHODES D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 303 § 200 (1919) (trans., 9 Modern Legal Philosophy Series)).

54. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

55. *Supra* note 7.

In *Chisom*, Justice Scalia said that the ordinary sense of "representatives" should be controlling. He used *Webster's Second New International Dictionary* to establish that "[t]here is little doubt that the ordinary meaning of 'representatives' does not include judges."[56] First, note Justice Scalia's own rhetoric: "there is little doubt." He said this because his theory of meaning is based on the precision of words; if the ordinary were subject to doubt, much of the theory would be as well. By using such rhetoric he hopes to convince by an absolute assertion of confidence in the precision of language. Second, who cares about Webster? Why should Webster be the source of ordinary meaning and, more importantly, why is the ordinary sense controlling? Justice Scalia does not address these questions.

In his analysis of the meaning of "representatives," Justice Scalia admitted that judges do "represent" in a sense, "but not in the ordinary sense."[57] Perhaps this is accurate. Usually we do think of a representative as someone who has been elected by the people,[58] not someone who has been appointed by the executive. Usually, therefore, we do not apply the ordinary meaning of representatives to judges because ordinarily they are not elected. But in *Chisom* the judges *were* elected. And this is precisely Justice Stevens's point when he said that "[t]he word 'representatives' refers to someone who has prevailed in a popular election,"[59] in this case, judges. When Justice Scalia said that "the ordinary speaker in 1982 would not have applied the word [representatives] to judges"[60] he might be right. But why is the ordinary speaker relevant in this case where the circumstances are not the ordinary ones? "Ordinary" meaning should not be applied to the unusual situation. So when Justice Scalia concluded his dissent by saying that the majority had "depriv[ed] legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning,"[61] perhaps we should applaud because applying the "ordinary" meaning, as a rule of thumb, does not pay attention to the fact that cases of law often arise in extra-

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56. *Chisom*, 501 U.S. at 410. The reliance on dictionaries is deceptive. First, a dictionary is a form of external context. If its use is acceptable, why should a judge not also be able to rely on legislative history to clarify the meaning of words? Taylor, *supra* note 6, argues that textualists should allow the use of legislative history for this purpose. Second, relying on a dictionary for meaning only serves to substitute a lexicographer's judgment on ordinariness (if that is indeed the lexicographer's purpose) for the judge's. Judges should not be naive to the editorial choices involved in compiling a dictionary. *See* David Mellinkoff, *The Law Dictionary*, 31 UCLA L. REV. 423 (1983); Aaron J. Rynd, *Dictionaries and the Interpretation of Words: A Summary of Difficulties*, 29 ALBERTA L. REV. 712 (1991). Third, how is a judge to decide which dictionary to choose, and which edition? This choice resembles the bad scavenger judge, combing through different dictionary definitions to find the definition that fits best with a preconceived notion of ordinariness.

57. *Chisom*, 501 U.S. at 410.

58. I hesitate to use the word "usually" here for fear of being accused of invoking an ordinary meaning.

59. *Chisom*, 501 U.S. at 400.

60. *Id.* at 411.

61. *Id.* at 417.

ordinary circumstances.[62] Thus, Justice Scalia's analysis does not support his claim that a regular method will find law as it exists.

Who is the good judge in *Chisom*? *Chisom*, like virtually any other case involving statutory interpretation where there are conflicting views, shows us two versions of law. Neither is perfect, neither is right in any absolute sense. The case does not highlight either judge as necessarily good or bad. But Justice Scalia wants law to be right. He wants textualism to facilitate good judging in every case, and textualism has merit in many respects. For instance, it is sound policy to remind judges of the importance of the text in statutory interpretation. Textualists have also helped to demonstrate some of the failings of legislative history. In addition, Justice Scalia's refusal to engage in purposivism could, though it is unlikely, encourage Congress to draft better worded statutes.[63] However, the link between textualism and the good judge is problematic. It fails to recognize that a bad judge is equally bad whatever the interpretive method, and that the quality of a judge will depend on her ability to master all the components of the legal process in order to produce a coherent and defensible jurisprudence. Our ideal should equate good judging with good judgment, not with a fundamentalist's adherence to method. Moreover, even if one were to accept that textualism and good judging were coupled, textualism has serious flaws as a theory of meaning, as Part III suggests. Its failings in this respect impact upon textualism's idealistic aspirations as a theory of judging. Thus, textualists who insist upon textualism as the sole method for statutory interpretation in fact encourage the bad judge, who, under the guise of a perfect method, is still free to construct arguments to fit results.

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62. Justice Scalia does examine the consequences of the majority opinion. He said that the majority ushered in a significant substantive change in the law by making vote dilution claims available with regard to judicial elections where, normally, the principle of "one person, one vote" did not apply. This, however, is a policy argument and not a textual one. As Popkin commented, Justice Scalia does not advance it "as an affirmative reason to support his interpretation." *See* Popkin, *supra* note 6, at 1141.

63. This is part of the rationale behind Justice Scalia's call for bright line rules in adjudication: they promote predictability for the legislature and for citizens. *See* Maryland v. Craig, 497 U.S. 836, 860 (1990) (Scalia, J., dissenting); Burnham v. Superior Court of California, 495 U.S. 604 (1990); in addition, see Scalia, *supra* note 54. However, while it is an admirable goal to give Congress incentives to clarify the statutes it produces, there are practical problems. Aside from the complications of drafting, the unforeseen (and unforeseeable) applications of the law, and the haste and often urgency with which legislation is passed, sometimes, Congress may deliberately leave the question for the courts to decide. Furthermore, the fact of urgency and haste in the passage of legislation will sometimes lead to drafting errors. See, for example, Justice Stevens's dissent in United States v. Locke, 471 U.S. 84 (1985) (noting that judges should take such errors into account and use legislative purpose as a guide to a better interpretation).

III. TEXTUALISM'S FLAWED THEORY OF MEANING: THE SUBJECTIVISM OF THE JUDICIAL READER

The textualist theory is that meaning is objective not subjective, public and not private. It arose partly in reaction to the private theory of meaning often attributed to intentionalism. Under this theory, the interpreter's task was to apply the intent of the author, or, effect the intent of the legislature. As already mentioned, however, the public choice school's critique of legal process theory left such notions of collective institutional intent in disarray.[64] Thus a new problem arose. If it was impossible to know the intent of the legislature by looking at the legislative process but the interpreter's job was still to effect the intent of the legislature, then what was a judge to do?

Textualism's answer is to diminish, if not erase, the role of the author/legislator as a private person. Subjective non-textual intentions are not important. Whatever the author meant to say or wanted to say is not relevant when aligned with what the author did in fact say. For textualism, the text is not merely evidence of intent—it is *the* manifestation of intent.[65] As constitutional support for this limited view of intent, textualists remind us that only the text of the statute has been passed by both Houses of Congress and signed by the President; not the committee reports, not the floor debates, and certainly not post-enactment legislative "history."[66] Thus, only the text is law.[67] Notice, however, textualists do not claim that intent is unimportant, just that the text is the only legitimate source for intent. The premise that judges effect the intent of the legislature is still intact.

It is here, however, that textualism unravels as a theory of meaning. On the one hand textualists acknowledge the importance of intent to meaning, but on the other hand, the theory of intent offered is wholly inadequate to be meaningful. This becomes clear by considering the context within which statutory interpretation occurs.

One can comprehend the context of statutory interpretation by comparing it to another more obviously artistic genre: interpretation of literature. Consider, for example, the interpretation of a novel. In one sense, the subjective (or even textual) intentions of a novelist are of no importance (though literary critics might argue amongst themselves about how important an artist's intentions are to the meaning of a work). This is so because of who the reader is. The reader of a novel is usually a private person who will derive meaning as he likes. Such a

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64. *See supra* notes 29-30 and accompanying text.

65. "The text is the intention of the authors not of the framers." Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention, in* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 45, 50 (Sanford Levinson et al. eds., 1988).

66. *See* Waterman S.S. Corp. v. United States, 381 U.S. 252 (1965), where the Court noted that the views of a subsequent Congress should not be used to determine the intent of a previous Congress.

67. Though for a textualist such as Judge Easterbrook, legislative history can be objective and used when "the search is not for the contents of the authors' heads but for the rules of language they used." *In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989).

"private" reader may wonder what the author meant, or he may not care other than to know what the words mean to him. In any event, what the reader thinks the author thought is not of particular importance to anyone other than the reader. Unlike a novel, however, legislation is meant to DO something. Whereas the consequences of a purely artistic endeavor are usually personal and private (to author and audience), the consequences of legislation are not. What the author of legislation thought about what he was doing is of enormous practical importance. Thus, the setting for statutory interpretation and for the reader is completely different.[68] It is why, for statutory interpretation, judges effect the intent of the legislature (even under the textualist view). It means that a judicial reader, unlike a private reader of a novel, is charged with a task of interpretation where the subjective intent of the author *is* important to the meaning of the text.

By defining intent as textual only, textualists hope to avoid the vagaries of subjectivism, but subjectivism is in the nature of the business of statutory interpretation. While textualists could accurately say that the text is *a* manifestation of the intent of the author, they instead claim absolutely that the text *is* the intent of the author as a way around subjectivism. Doing so ignores the imperfections of the text as an expression of that intent and, unlike a good textualist, forgets the context of statutory interpretation itself.

Textualists argue that they have replaced a private theory of meaning with an objective one. In fact, they have replaced one private theory of meaning with another private, and subjective, theory of meaning. That is, textualists replace authorial intent as the criterion for meaning with the meaning the text evokes in the mind of the judicial reader. They shift away from the subjectivism of the author to the subjectivism of the reader as the source of meaning. Textualists would surely object to this claim. They would insist that their theory of meaning is objective not subjective because it relies on the objective ordinary meaning of words, a meaning which a judge cannot control. The judge, the textualist claims, is merely a servant of meaning, finding the law that is out there in the text. The textualist insists that the "I" of the judicial reader is taken out of the process, viewing the text as a frozen artifact, a testimonial to the original meaning.[69]

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68. This is similar to a point Posner makes, that legal and literary texts are different kinds, with non-intentionalism being appropriate for the literary, while authorial intent is important for legal texts. *See* POSNER, *supra* note 7, at 218-19.

69. Textualists distinguish between original intent and original meaning. In the latter, unlike the former, the author's intent is not important. *See* Taylor, *supra* note 6, at 330. Other problems of textualism also arise here. For example, if the text has an original meaning how can textualism account for changes in the meaning of words? A textualist would answer that the structure of a text gives a clue as to the flexibility of its meaning. For instance, Justice Scalia has said that the Sherman Act is structurally a text that was meant to evolve and that his structural approach supports statutory evolution over time. *See* Business Elecs. v. Sharp Elecs., 485 U.S. 717 (1988) and United States v. Fausto, 484 U.S. 439, 453 (1987). That is, other statutes passed later in time can effect the meaning of an earlier statute. See also *United Savs. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) where Justice Scalia describes the interpretive process as a "holistic endeavor" whereby terms, usage, and the context of the larger statutory framework can be consulted.

Another problem arises as to the audience, which in turn reflects the problem of changed meaning. Should a textualist derive the ordinary meaning as it would have been understood at

At this stage, in order to support claims of objectivity, the textualist would distinguish between "construction" and "interpretation."[70] For example, a textualist judge constructs the text but does not interpret it, because to interpret would be to introduce the "I" into the process of finding law. As Taylor argues, however, textual construction can only remain impersonal (and non-interpretive) so long as judges agree on the background principles.[71] In other words, interpretation is unnecessary when the norms for communication are widely shared and understood. An example from everyday conversation illustrates the point. Think of two old friends who sit listening to a basketball game on the radio. The radio announcer says something like: "Jordan dribbles, crashes the boards, and spins one in." Neither friend needs to *interpret* this statement, but merely (and automatically) *constructs* its meaning from the everyday ordinary usage of basketball lingo. This illustration applies to statutory interpretation because a textualist like Justice Scalia would like to describe Congress and the Court as two old, but separate, friends who share a common language. Thus, when Congress speaks, the Court, speaking the same language, knows what Congress says. The Court needs only to construct the statutory meaning and interpretation is unnecessary.

But is there such a common language? Are the norms of legal communication shared among institutional actors as basketball jargon is shared among fans? Textualists would have us believe that there is a common language, or that there should be one.[72] Consequently, in order to avoid having to interpret, textualists need to assert unity on background norms. This explains the appeal to the ordinary meaning of words as an objective shared theory of meaning. It is another textualist fiction, and lurking behind it is adherence to background norms such as proper grammar, use of established canons of construction, and reliance on the dictionary: the rules of the rule-based approach to meaning. A quote from Justice Scalia's concurring opinion in *Green v. Bock Laundry Machine Co.* illustrates the textualist vision:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.[73]

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the time the statute was passed, or as a contemporary audience would understand it? These questions, however, are outside the scope of this Note.

70. *See* Taylor, *supra* note 6, at 368.

71. *Id.* at 370.

72. Earlier, I argued that the judicial and congressional languages are different, characterizing each branch of government as a political branch, each with its own way of making law. *See supra* text at note 53.

73. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989).

What are we to make of this statement? There are two key assumptions. First, Justice Scalia invokes an "understanding" of the whole Congress: that each member of the Congress "most likely" voted on a given meaning, that of ordinary usage. This is a particularly odd assumption when set against the textualist critique of the concept of legislative intent, for here he relies on a conception of Congress as sharing a collective sense of ordinary meaning. Second, he makes a critical assumption that Congress and courts share a common consciousness as to the legal landscape within which a statute finds its niche, thus the language about "the surrounding body of law." Realistically, however, textualism's claims to objectivity, either through ordinary meaning or through shared background norms, do not withstand analysis.

Objectivity in statutory interpretation is a myth, though one Justice Scalia undoubtedly believes in. For example, he once argued that the first goal of interpretation for all statutes is "to get the meaning *precisely* right," as if meaning were like an object to be found rather than something to be created.[74] He then said he would only use rules such as "remedial statutes are to be liberally construed" when they serve to produce "the *most plausible* meaning [that] their language reasonably conveys,"[75] a quite different, and by its terms a far less objective, standard for meaning than getting the meaning precisely right. Thus, in the midst of the same argument, he slipped from a standard based on precision to one based on plausibility and reasonableness, showing how easy it is to lapse into a more subjective approach.

To be fair, however, objectivity has more than one sense. One does not have to be precise in order to be objective. The textualist goal of objectivity could come from the notion that meaning is like an objective, scientific truth and, therefore, capable of precision through construction. Precision in this sense depends on shared background norms (otherwise, if one of the two old friends listening to basketball did not understand basketball usage, he would derive a different meaning from "Jordan dribbles" than his companion). Second, it could also mean that the process the judge uses is objective, thus a judge could objectively undertake to find the most plausible meaning. Here, precision in the objectivity of approach depends on method. In neither sense, however, does the textualist make the case for objectivity.

The case for objectivity in meaning due to shared background norms is particularly weak. It depends, as Justice Scalia indicates, on assuming that Congress has the ordinary meaning in mind when it votes on the words of a statute. (Notice also another implicit assumption he makes here: that Congress votes on the words of the statute, not what they each perceive to be the statute's purpose.) It also means that Congress conscientiously and studiously respects the

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74. Scalia, *supra* note 50, at 582 (emphasis added). He said this in critical response to use of the maxim "remedial statutes are to be liberally construed." He correctly rejects the automatic application of such maxims. Were judges to wield them without thinking, the result would be a form of statutory stereotyping. It is interesting to note that here Justice Scalia rejects the use of a canon as dogmatic, which in turn serves to undermine his own arguments for the importance and objectivity of canons to a true textual interpretation. *See infra* text at note 80 and text accompanying notes 82-84.

75. Scalia, *supra* note 50, at 582 (emphasis added).

rules of grammar during the drafting process.[76] Moreover, it depends on the notion that there is a shared ordinary meaning. Each assumption in turn seems so absurd that one wonders if it can be seriously advanced. In fact Congress consists of a diverse group of people each operating under time pressure and for admittedly unknowable reasons. To insist that such a body shares background norms when enacting legislation leads one to conclude that textualism is not really about the meaning of words,[77] and that the fiction of precise and objective meaning instead serves a normative end (such as the proper role for a judge). In other words, textualists do not believe the fiction of objectivity, but think that by advancing it the law will become more scientific and more precise because the subjective role of the judge will be reduced.

Thus the importance of the second assumption Justice Scalia made in *Bock Laundry*, that Congress is aware of the setting in which the statute will be interpreted. If it were true, then the case for objectivity would be bolstered because judges would not have to consider the implications of legislation drafted without concern for grammar, ordinary meaning, or in accordance with certain canons of construction. The assumption, however, forgets that the two branches of government are separate institutions and are institutionally aware of and concerned with different things. Members of Congress are not apt to be well-versed in the rules of statutory construction, of existing case law, or of the history of other statutes and the impact one law will have on another law. It is not their job (but the job of the judiciary) to be concerned with such things. As Eskridge says, "Members of Congress are not omniscient about legal rules, and the nature of the legislative process gives them incentives to focus on the particular problem and not on future issues of interpretation."[78] It is, therefore, unlikely that insisting on ordinary meaning and consistent application of legal rules to ambiguous texts is going to change the fact that "Congress is as Congress does," particularly if the application of the rules is not as objective as textualists claim.

Objectivity also fails in its second sense, that of objective method. That textualists lack an objective method is best seen in the use of traditional canons of construction. There are, for example, substantive and procedural canons. While Justice Scalia will invoke the latter, he prefers not to use the former, such as the rule of lenity (that statutes will be construed to favor a criminal defendant) because they involve substantive policy and are often invoked without textual analysis.[79] But he accepts the principle behind use of such substantive canons because "[o]nce they have been long indulged, they acquire a sort of prescriptive validity, since the legislature presumably has them in mind when it chooses its language."[80] In other words, they become part of the context for meaningful legislation, a part of the legislative lexicon or psyche. However his analysis

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76. Crandon v. United States, 494 U.S. 152, 169-70 (1990) (Scalia, J., concurring). Here Justice Scalia disagrees as to Justice Stevens's ungrammatical construction.

77. Popkin, for example, argues that textualism is about something other than the meaning of words. Popkin, *supra* note 6, at 1173.

78. Eskridge, *supra* note 5, at 680.

79. *See* Scalia, *supra* note 50.

80. *Id.* at 583.

would be less applicable to the procedural canons that he favors because they are not about substantive policy rules. Thus they are less likely to be in the forefront of a legislator's mind. For instance, a legislator, when drafting a list of terms, probably will not be thinking about the canon *noscitur a sociis*, that terms in a list will be construed to share the same quality or meaning.[81]

The procedural canons, such as *ejusdem generis*, avoiding surplusage, *expressio unius est exclusio alterius*, the punctuation canon, and the agency deference canon among others are favorites of textualists.[82] But like the use of dictionaries,[83] canons do not determine anything other than what a judge wants them to determine.[84] This means that in the quest for ordinary, accurate textual meaning, the textualist judge can choose whether or not to use a canon, and which canon to invoke and which to ignore—decisions that resemble the non-objective method of picking and choosing bits of legislative history to find a legislative purpose.

Textualism's claims about objectivity in meaning and objectivity in approach fail. Objectivity is an important part of the textualist theory because of its, also flawed, notion that the text is the intent of the legislature. The new theory of intent was designed to prevent the judge from being able to decide what she thought the legislature intended by resorting to sources such as legislative history. Textualists think that though the goal of effectuating the intent of the legislature is sound, using such sources only increases the chances that a judge will decide personally, not objectively, what a statute means. The text is meant to be objective and judges are meant to approach it using tools that are mechanical and so facilitate the likelihood that the result will be objective. But it does not work. On a normative level, the "I" of the judicial reader is and should be an important part of the legal process. On a more practical level, the text cannot be the sole manifestation of intent considering the context within which statutory interpretation occurs. Similarly, an objective approach to the text is impossible, insofar as it depends on the assumptions Justice Scalia set out in *Bock Laundry*. For reasons discussed above, these assumptions are fictions. Judges, therefore, should *not* assume that either assumption is the case because in fact courts and legislatures speak different languages, and indeed, do so for

81. Use of this canon is at the center of the controversy in *Sweet Home*. *See infra* Part IV.

82. Eskridge, *supra* note 5, at 664-65. They are "rules of thumb for allocating decisionmaking authority." *Id.* at 664.

83. *See supra* note 56.

84. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950) and Eskridge, *supra* note 5, who comments that Justice Scalia's revival of the canon method of interpretation "potentially expands upon the judge's range of discretion." For example, as Eskridge points out in his analysis of *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989): "While Justice Scalia invokes two widely used canons of construction, he neglects even to mention the canons that cut against his position" thus leading Justice Scalia to a result at odds with another canon, that the text of a statute is controlling. *Id.* at 675.

the reason that each branch is part of the legal process as a whole, with each impacting the law in accordance with its own institutional norms.[85]

IV. *SWEET HOME*: STATUTORY INTERPRETATION IN DISARRAY

What method of interpretation is left for judges to use? Intentionalism suffers from the same flaws of textualism. It is too private and indeterminate and open to judicial (in)discretion. Purposivism is problematic for the reasons Justice Scalia has suggested. Using a totality of the circumstances approach sounds ripe for inconsistency and unpredictability, and, as Justice Scalia has commented, is an approach that means the law, as such, has nothing to say on the matter.[86] In fact, for deciding cases, the methods of statutory interpretation are a mess. As *Sweet Home* demonstrates rather vividly, meaning is uncertain, statutes are uncertain, methods are uncertain, and law is uncertain. However, despite the poor showing for statutory interpretation vis à vis meaning, *Sweet Home* does show that law is an evolving product of diverse institutional actors. It is what judges make, what Congress makes, and what agencies make.

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon[87] had a tortured history: from the D.C. District Court[88] to the D.C. Circuit,[89] then a rehearing and reversal in that circuit,[90] then a denial of another rehearing,[91] and finally a Supreme Court reversal of the circuit court's reversal of itself, thereby affirming the district court's original ruling. The majority and dissenting opinions span the gamut of statutory interpretation arguments: plain meaning, canons of construction, arguments from legislative history as to the purpose of the statute and the meaning of the words, structural arguments, hypertextual arguments, and intentionalist arguments. Justice Stevens and Justice Scalia face off again in majority and dissent, with each making arguments from text, structure, and purpose. Justice O'Connor concurs with a few textual arguments of her own and, generally, the Supreme Court serves only to supplement and re-

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85. Marshaw argues that a method of interpretation should rely on "some vision of the constitutional polity." Marshaw, *supra* note 20, at 839. The view of law I suggest, that law is a subject for each branch of government to formulate under its own institutional constraints, is a vision of law as always evolving in meaning, and always subject to change. It is like a free market theory of law as institutional struggle. By contrast, the textualist rhetoric of separation of powers in fact would bring the powers closer together into a legal conspiracy by presuming a common language and a mechanical judiciary.

86. Scalia, *supra* note 54.

87. 115 S. Ct. 2407 (1995).

88. Sweet Home Chapter of Communities for a Great Oregon v. Lujan, 806 F. Supp. 279 (D.D.C. 1992).

89. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993).

90. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1993).

91. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 30 F.3d 190 (D.C. Cir. 1994).

argue issues of the legal meaning of a text that had already spawned four judicial opinions.

Sweet Home is about the meaning of the word "take" as it appears in the Endangered Species Act ("ESA") and about whether a regulation promulgated by the Secretary of the Interior under the ESA defining "take" is reasonable. Section 9 of the ESA makes it unlawful for any person to "take" an endangered species within the United States.[92] The ESA also defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[93] On the basis of this information, the issue of the case can be posed: does a timber harvester who harvests a forest damage the habitat of an endangered species so as to "take" that species (or a member thereof)? In other words, does timber harvesting harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect an endangered species? The successive answers to this question from the several judicial opinions were yes, yes, no, no, and finally, yes. Timber harvesting as a form of habitat modification "harms" and therefore "takes" an endangered species.

The challenged regulation under which the plaintiffs were charged with taking an endangered species defined the word "harm" in the statutory definition of "take" to mean: "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[94] It is fairly clear that under the regulation an act such as timber harvesting which ruins the habitat of an endangered species takes the species and so is unlawful. However, there are two things to consider about the definition. First, does it directly comport with congressional intent about the meaning of "take" as defined in the statute? Second, even if there is not an explicit showing of congressional intent about whether "take" includes "to take by habitat modification," is the Secretary's definition of harm so as to include habitat modification in the meaning of "take" nonetheless a reasonable one? These are the relevant questions to ask in cases examining an agency's interpretation of a statute under the *Chevron* regime.[95]

The district court decided the issue in favor of the Secretary under the first stage of *Chevron*.[96] As directly indicated by Congress, the meaning of "take" in

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92. Endangered Species Act Amendments of 1982, 16 U.S.C. § 1538(a)(1)(B) (1994).

93. 16 U.S.C. § 1532 (1994).

94. 50 C.F.R. § 17.3 (1995).

95. Under Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), there is a two-step test that courts must follow when evaluating agency interpretations of statutes. A court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Id.* at 842. If, on the other hand, the statute and congressional intent are ambiguous, then a court has to decide if the agency's interpretation is "based on a permissible construction of the statute," that is, it must be "reasonable." *Id.* at 843-44. Thus under the *Chevron* regime, agencies are allowed to make law absent clear and contrary congressional intent, provided that the law they make is reasonable.

96. Thus an examination of the reasonableness of the Secretary's construction was not necessary because the Secretary was only effecting the intent of Congress; though the court added that if such a determination were necessary, it would have been reasonable. Sweet Home

the ESA itself encompassed habitat modification as a form of harm thus making the Secretary's regulation a direct implementation of congressional intent. The court relied on "the language, structure and history" of the ESA, the combined effect of which revealed congressional intent.[97] The court rejected both of plaintiffs'[98] arguments as to the meaning of "take." Plaintiffs' first argument concerned legislative history. A Senate Committee report on the ESA had deleted from the definition of "take" the phrase "destruction, modification, or curtailment of [the endangered species'] habitat or range."[99] Plaintiffs asserted that this deletion meant that Congress consciously narrowed the meaning of "take." But the court said there was no affirmative evidence that the Senate rejected this provision "specifically because it wanted to exclude habitat modification from the definition of take."[100] Besides, other parts of the Senate report indicated the opposite: that "take" should be defined in the broadest possible terms. Nevertheless, the district court concluded, in either case the argument from legislative history was too speculative.

Plaintiffs' second argument attempted to derive the meaning of "take" from the statute's structure. For example, section 4 of the Act authorized the Secretary to acquire land for the conservation and preservation of species. Conservation and preservation are important counters to habitat modification and in this section the ESA gave the Secretary a weapon, land acquisition, to further these statutory goals. Thus, plaintiffs argued, land acquisition was the *only* means available to the Secretary for protecting against habitat modification. To put the argument in more textualist terms, because Congress was clearly aware of the goal of preserving habitat in one section of the statute, the remedy Congress gave the Secretary in that section exhausted the subject and the available remedies. The court retorted with a textual response, namely that there was no way to infer from the text "that Congress intended it to be the only tool"[101] to prevent habitat modification.

From a textual point of view, who has the better argument? Both plaintiffs' and the court's arguments are textually accurate. The question therefore is what can properly be inferred from the text, and as is often the case with structural arguments, inferring meaning from structure is merely a doctrinal substitute for inferring statutory purpose from legislative history.[102] The textual answer is not

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Chapter of Communities for a Greater Oregon v. Lujan, 806 F. Supp. 279, 285 (D.D.C. 1992).

97. *Id.* at 285.

98. The plaintiffs in *Sweet Home* were an association of small logging companies, small landowners, and families who allegedly were economically dependent on the forest products industry in the Pacific Northwest.

99. *Sweet Home*, 806 F. Supp. at 283.

100. *Id.*

101. *Id.*

102. Justice Scalia's dissent in *Sweet Home* made this common textualist move when he said that the majority's reading of "take" "obviously contradicts the statutory intent." Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2423 n.2 (1995) (Scalia, J., dissenting). He used the word "statutory" instead of the word "congressional" in order to maintain structural purity and avoid any direct reference to purpose, but it remains to be answered: does a statute "intend" anything? The district court also made its own argument from structure, but unconstrained by the textualist method, spoke of structure and statutory

necessarily any clearer than that to be found from other sources. Regardless of the textual uncertainty, it is surprising that the district court did not reach *Chevron* stage two. This is probably due to two factors. First, Congress was aware of the Secretary's definition of harm in the regulation and of court decisions upholding it[103] when they reauthorized and amended the ESA in 1982.[104] And second, the court measured the statute's structure against what they called the statute's purpose "of attacking the issue of conservation as aggressively as possible."[105] This colorful imputation of purpose allowed the court to find that congressional intent was clear.

The district court's method of decision was of course reconsidered on appeal to the D.C. Circuit and U.S. Supreme Courts. Before proceeding to the appellate level of scrutiny, however, it is worthwhile to present the larger issue *Sweet Home* embodies. It is a case that highlights the role statutory interpretation plays in deciding cases, and what it ultimately means. If statutory interpretation were about meaning and respect for the rule of law, *Sweet Home* should have been an easy case. Given the command of *Chevron* that a Secretary's interpretation of a statute need only be "permissible" or "reasonable"; given that the relevant actors in a congressional committee knew of the regulation; given that the regulation is consistent with the statute's subject matter: the protection of endangered species; given that it makes sense to say that modifying an endangered species' habitat so as actually to kill or injure the species also harms the species; given all this, the answer seems clear that the regulation should be upheld. But statutory interpretation is about making law, and law is a complicated business, particularly when the implications of upholding the Secretary's regulation are that Congress has delegated to an agency the power to regulate private land use, rendering the otherwise economic (or recreational) use of land ancillary to environmental concerns.[106] Thus *Sweet Home* makes one thing clear: the setting for statutory interpretation is political.

As if reflecting the priority of the political posture of the case over the importance of interpretive method, in the opening paragraph of his *Sweet Home* dissent Justice Scalia uncharacteristically, and perhaps unselfconsciously, forgot that he was supposed to be wearing a textualist hat. He said, "The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes *unfairness* to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national

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purpose in the same breath. *Sweet Home*, 806 F. Supp. at 285.

103. *See, e.g.*, Palila v. Hawaii Dep't of Land & Natural Resources, 639 F.2d 495 (9th Cir. 1981).

104. Justice Scalia, forced into the legislative history, admitted that members of Congress did directly contemplate, and indirectly approve, the Secretary's definition, but that this occurred in subcommittee. Congressional "awareness" never reached the floor and so, he said, Congress was not properly on notice. *Sweet Home*, 115 S. Ct. at 2428 (Scalia, J., dissenting).

105. *Sweet Home*, 806 F. Supp. at 285.

106. For a discussion of some of the implications of *Sweet Home*, see Elsa F. Kramer, *Floats Like a Butterfly, Stings Like a Bee*, 39 RES GESTAE, Sept. 1995, at 11 and Frona M. Powell, *Defining Harm Under the Endangered Species Act: Implications of* Babbit v. Sweet Home, 33 AM. BUS. L.J. 131 (1995).

zoological use. I respectfully dissent."[107] "Unfairness" ordinarily concerns the textualist only in the sense that the text be given a fair reading. But here, Justice Scalia is clearly aware of a different kind of unfairness, one related to policy, and to the law of the statute. It prompts the reader to question whether Justice Scalia's textualist analysis, through which he would find law, is influenced by extra-textual concerns.

Returning though to the above assessment that *Sweet Home* seems like an easy case from the standpoint of *Chevron* and the other listed factors, and forgetting the political component of the case, what remains interesting is that textualism, like purposivism, provides the plaintiffs with arguments that are more distracting than illuminating, more likely to obfuscate than enlighten. Before the D.C. Circuit, the appellants (formerly the plaintiffs) raised additional textual arguments and the court, unconvinced, answered in kind.[108] Thus *Sweet Home* shows that textual arguments are always available—similar to arguments about intent—to create ambiguity and textual uncertainty that might not have otherwise existed for an "ordinary" or even a judicial reader.

The appellants found more sympathy for their textual construction from the dissenting Judge Sentelle. He argued that the meaning of the word "take" clearly did not include habitat modification. He appealed to common sense and ordinary (common law) meaning: "I have in my time seen a great many farmers modifying habitat. They modify by plowing, by tilling, by clearing, and in a thousand other ways. At no point when I have seen a farmer so engaged has it occurred to me that he is taking game."[109] Judge Sentelle's use of the subjective "I" belies the lack of textual objectivity in the approach. In fact, Justice Scalia also surprisingly took a similar step in his discussion of the issue. Instead of beginning with the textual meaning in his dissent, he said, "If 'take' were not elsewhere defined in the [ESA], none could dispute what it means, for the term is as old as the law itself."[110] He then cited the extra-textual meaning, and as authority, referred to the *Oxford English Dictionary* (1933), *Webster's New International Dictionary* (1949), case law, Blackstone, the Migratory Bird Treaty Act (a hypertextual reference), and then said how well this definition fit the statute. But, his first duty as a textualist should be to focus on the meaning of "take" provided in the

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107. *Sweet Home*, 115 S. Ct. at 2421 (1995) (Scalia, J., dissenting) (emphasis added).

108. Appellants claimed the use of the singular in one sentence implied the use of the singular in a second sentence, where the second usage could be either singular or plural. The court responded, basically, that the second sentence could be either singular or plural and that there was no reason that the first sentence should control the second. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1, 6 (D.C. Cir. 1993). Absent clear agreement on usage, that is, on background norms, it is impossible to say who is right, though the court cited of the U.S. Code (the rule that the singular includes the plural "unless context indicates otherwise") for support of its position. *Id.* at 7. The appellants also made an argument about intent from the structure of the ESA: that because Congress created two categories, endangered and threatened, they should remain separate. The court responded that there were still differences between the categories and that Congress also granted the Secretary the discretion to give threatened species the maximum protection. *Id.* at 6.

109. *Id.* at 12.

110. *Sweet Home*, 115 S. Ct. at 2422. This seems an astonishing statement for a textualist. "Take" *is* defined elsewhere in the ESA. It should not matter what other meaning it might have.

statute, not to establish extra-textual support for an alternative meaning that better suits his personal conception of what the word means. Justice Scalia did explain why *he* thought Congress chose to define "take" in the statute as it did (to include the *process* of taking), and admitted that by doing so Congress slightly modified the common law definition; but still his argument was based on the common law meaning of "take" and colored his interpretation of the text.[111]

Justice Scalia also took up Judge Sentelle's common sense, ordinary use argument. He said that the Secretary's definition made nonsense of the word "harm." It was absurd, he suggested, that a farmer, whose tilling of a field indirectly impaired the breeding of an endangered fish, had "taken" the fish.[112] But his nonsense argument is backwards. He—like Judge Sentelle—tried to derive the meaning of "harm" from the (common law) meaning of "take" when Congress urged us to do the opposite: define the meaning of "take" from the meaning of "harm." "Harm" is a word of expansion and limitation. As a word in a series of words used to define one word it both expands upon the defined term by giving it another sense, as well as limits the possible meaning of the term to that sense. Perhaps Congress in its definition of "take" made nonsense of the ordinary meaning by defining it to mean harm, but according to the text of the ESA, that is in fact what Congress did.

As to the idea that "harm" is a word of limitation and expansion, Judge Sentelle, Judge Williams (both of the D.C. Circuit), and Justice Scalia would counter—over the objection of Judge Mikva (also of the D.C. Circuit) and Justice Stevens—that according to the canon of construction *noscitur a sociis*, "harm" is not a word of expansion. Unfortunately, the meaning of this canon, like the meaning of "take," is itself disputable. *Black's Law Dictionary* defines it as standing for the proposition that "[t]he meaning of a word is or may be known from the accompanying words."[113] This however is the "literal" meaning. Judge Sentelle and the appellants preferred another: "a general word in a list should be interpreted narrowly 'to avoid the giving of unintended breadth to the Acts of Congress.'"[114] Justice Scalia took a somewhat more objective approach, preferring it to mean "[if] several items in a list share an attribute [it] counsels in favor of interpreting the other items as possessing that attribute as well."[115] The conflict over the meaning of a canon hardly supports the results that come from using it. Using canons to establish meaning is problematic to begin with.[116] Chief Judge Mikva regretted that the (then) dissenting view would find an agency interpretation impermissible "based solely on a seldom-used and indeterminate

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111. I am not suggesting that this is an unacceptable way to approach the issue, just that it is not good textualism.

112. *Sweet Home*, 115 S. Ct. at 2423.

113. BLACK'S LAW DICTIONARY 2329 (6th ed. 1990).

114. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1, 12 (D.C. Cir. 1993). Judge Sentelle is quoting Chief Judge Mikva who is quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961).

115. *Sweet Home*, 115 S. Ct. at 2424. Justice Scalia is citing Justice O'Connor's opinion in Beecham v. United States, 511 U.S. 368, 388 (1994).

116. *See* discussion *supra* notes 82-85 and accompanying text.

principle of statutory construction"[117] which, as he later argued at length, is anyway against the plain meaning of the statute.[118] Even under Justice Scalia's more objective definition of the canon, it is easy to make arguments on both sides. Ultimately Justice Stevens probably had the better textual argument. As he said, it does not follow that a word, which via the canon has the attributes of other words in the list, cannot at the same time retain a meaning independent of those words.[119]

Clearly there is textual confusion. No one knows what "take" means; or, to put it another way, everyone knows what "take" means but no one agrees.[120] If the definition of "take" is as clear as common sense, as Judge Sentelle and Justice Scalia argue, why would Congress elaborate with a list that includes "harm"? If "take" means "take" why go further?[121] Adding to the confusion, the circuit court made an interesting shift in its analysis. In an opinion reversing its earlier stand, the majority (now over Chief Judge Mikva's dissent) analyzed the problem under stage two of *Chevron* and found the Secretary's interpretation unreasonable. But, perhaps sensing the weakness of this argument, in the opinion later issued denying a rehearing, the majority appeared to switch suddenly to a *Chevron* stage one analysis, stating that there was "a clear determination by Congress that the prohibitions of § 9 should not reach habitat modifications . . . ."[122] This comes despite the district court's *Chevron* stage one analysis to the contrary; so much for "clear" congressional intent.

By the time the case reached the Supreme Court, both sides were assuredly ready for clarity. Justice Stevens, writing for the majority, wrote what is essentially a textualist opinion (against Justice Scalia's textualist dissent). Unlike the way he began *Chisom v. Roemer*,[123] in *Sweet Home* he began with the statute, not with purpose. He said he would consider "the text and structure of the Act, its legislative history, and the significance of the 1982 amendment."[124] Justice Stevens then attempted to characterize his entire argument as a textualist one. He said the text provided three reasons to favor the Secretary's interpretation: the first from ordinary understanding, the second from purpose, and the third from structure. As to the ordinary understanding, Justice Stevens, unlike Justice Scalia, began with the word "harm" not the word "take." He used *Webster's*

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117. *Sweet Home*, 1 F.3d at 10.

118. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 17 F.3d 1463, 1475 (D.C. Cir. 1993). He also objected to Judge Sentelle's use of the surplusage canon (that the Secretary's broad definition of harm rendered other terms in the list mere surplusage). *Id.* at 1472. Moreover, even a narrow definition of harm would render other terms superfluous, leaving as the only alternative to read harm out of the statute altogether. *Id.* at 1475.

119. *Sweet Home*, 115 S. Ct. at 2415. Justice Scalia countered that if this were the case, then the Court would have to give the words their "rare" meaning. *Id.* at 2424. But, this begs the question as to why meaning should be ordinary, especially if Congress intended otherwise.

120. Actually, six members of the Court agreed to form a majority.

121. In general, the problem with enumeration of terms is that it invites interpretation, which in this case seems reasonable given the structure (and implied purpose) of the ESA.

122. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 30 F.3d 190, 193 (D.C. Cir. 1994).

123. 501 U.S. 380 (1991). *See* discussion *supra* notes 39-41 and accompanying text.

124. *Sweet Home*, 115 S. Ct. at 2412.

Third New International Dictionary to define "harm" in the ordinary way: "to cause hurt or damage to: injure" and observed that absent from the definition is a requirement that harm be direct.[125] Thus, given the textualist's own assumptions about voting on the ordinary meaning of words, by including "harm" in the definition of "take," Congress accepted the idea of an indirect taking. Justice Stevens also said that Justice Scalia's common law definition was not the relevant one because the common law meaning was derived to refer to wild creatures generally speaking, while here, Congress was concerned with endangered species.

Who has the better textualist argument, Justice Stevens or Justice Scalia? The fact that the question can earnestly be made signifies the problems of supporting textualism as a means to objective meaning and consistency in statutory interpretation. *Sweet Home* makes this point clearly. There is no answer other than to say that, as is always the case, judges are constrained by methods of argumentation and the constraint is real. There are silly or abusive textual arguments, as well as silly or abusive purposive arguments. Milling through dictionaries is certainly easier than trudging through legislative history. But it is no more objective given that the miller, like the trudger, is a thinking judge who approaches every issue with his or her own experience of the law through which a statute must travel. Indeed, it is one of the reasons we have judges: so they can exercise their wisdom by processing the law through their experience of it.

Despite the problems of the textualist theory, it clearly has had an impact on the way judges decide cases. For example, Justice Stevens structured his opinion to be textually palatable. In *Sweet Home*, he began with text and ordinary meaning. Then, he constructed an argument from purpose entirely on textualist turf, making it harder to attack on purely methodological grounds.[126] Next he

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125. *Id.* at 2412-13. The opposing textualist view is that "take" requires a direct application of force, whereas the Secretary's definition of harm permits indirect takings.

126. First he makes a hypertextual type of argument by relying on a prior case's structural imputation of purpose into the ESA. He noted that in *TVA v. Hill* the Court described the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." 437 U.S. 153, 184 (1978). The *TVA* Court, he said, found the purpose reflected in "every section of the statute." *Id.* (Justice Stevens's argument illustrates the problem textualists have with precedent. Prior cases are law, and since a hypertextualist will rely on other statutes for meaning, the jump to reliance on cases as a source of meaning for particular words is not hard to make. The problem for the textualist is that many cases will rely on legislative history in their analysis; thus their meaning will not be pure.) The Court's statement of purpose in *TVA*, however, can also support an interpretation other than the one intended. For example, the language "most comprehensive . . . enacted by any nation" could be read to signify the fact that preservation of endangered species is a highly controversial political goal. The fact that the statute is the most comprehensive out there might mean that protections are, and have been, minimal, that the legislation only passed after a great political struggle, and thus should not be extended by judicial fiat.

Justice Stevens's second purposive argument is also textually weak. He cites the statement of purpose in section 2 of the ESA: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." But the statute only says "*a* means" and under the terms of the statute, "a means" was provided to conserve habitat by federal land acquisition, and there is no textual command to move further (nor is there a textual command to halt). This raises another problem with textualism: can a text realistically speak

presented a structural argument[127] before finally making an argument from legislative history.[128]

His textualist opinion was not, however, appreciated by Justice Scalia who continued the rhetoric of objectivity and precision. Justice Scalia's first dissenting words were "I think it unmistakably clear."[129] It is hard not to laugh, either from relief (finally, there will be clarity) or from a weary skepticism. Besides the cavalier assertion of clarity, his use of "I think" is also suspicious, given that as an objective theory of meaning, textualism wants to obviate the judicial reader as a subjective voice. Then, after his opening volley, what he proceeded to describe as "clear" actually, surprisingly, was clear, but was not nearly a comprehensive presentation of the issue.[130] Justice Scalia sought, and as a general matter seeks, to present the issue in the narrowest possible terms in order to avoid facing the fact that the text is not "unmistakably clear," that the law is clearly uncertain, and that it is the Court's job, not to get the meaning precisely right, but to determine the law of the statute.

Much of his opinion has already been examined, but a couple of additional points illustrate the rhetoric of objectivity.[131] After citing two dictionary definitions of "harm," Justice Scalia responded to Justice Stevens's notion of harm stating, "*In fact* the more directed sense of 'harm' is a somewhat more common and preferred usage"[132] and cited Opdycke's *Mark My Words: A Guide to Modern Usage and Expression* and the *American Heritage Dictionary of the English Language* for support. But why either source makes meaning precise and factual remains a mystery. Later he said that the common law meaning of "take" fit consistently throughout the chapter of the ESA, and therefore if the Secretary's definition of harm in the regulation did not fit into the rest of the

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to every issue? Is it even an admirable goal, given that legislators would have to make statutes still longer to account for everything intended and not intended?

127. Justice Stevens's (first) structural argument concerned Congress's adoption of section 10 by amendment. That section was a permit provision whereby a person who was engaged in an otherwise lawful activity that indirectly "took" endangered wildlife could apply to the Secretary for a permit allowing the activity. Such a person was required to provide a conservation plan with the application. Justice Stevens said that this section, passed after the Secretary's regulation was in effect, gave credence to the view that there could be an indirect taking under section 9. For Justice Scalia's response, see *Sweet Home*, 115 S. Ct. at 2428. Justice Stevens's second structural argument discussed sections 5, 7, and 9 together, to show how each section interacted and had a separate meaning, *id.* at 2416, a structural analysis that Justice Scalia disagreed with. *Id.* at 2426.

128. *Id.* at 2416. It is a similar argument to that made by the district court discussed *supra* notes 99-100 and accompanying text.

129. *Id.* at 2421.

130. "I think it unmistakably clear that the legislation at issue here (1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds *for the acquisition of private lands*, to preserve the habitat of endangered animals." *Id.* (emphasis in original).

131. His principal objection to the regulation was that it did not, he argued, carry a limitation of proximate cause, that it prohibited "habitat modification that is no more than the cause-in-fact of death or injury to wildlife." *Id.* at 2421. As a textualist, he was unwilling to imply such a limitation.

132. *Id.* at 2423 (emphasis added).

statute as well as the common law definition then "the Secretary's interpretation of harm is *wrong*."[133] "Unreasonable" might be a better word than "wrong," but Justice Scalia undoubtably meant what he said. For meaning to be categorically wrong or right supports his theory that meaning is objectively out there to be found, like the law itself.

The diversity of viewpoint in *Sweet Home* demonstrates that textual arguments are like other forms of argumentation: they involve choice. There are as many ways to argue from the text as there are to argue from the legislative history. The textualist view that judges should adopt one method of statutory interpretation does not survive *Sweet Home* because, if anything is clear afterward, it is that the text does not provide precise answers and that meaning is not plain and objective. The best explanation for why the case created such divergence of opinion is its political setting. It would be hard for any judge not to be aware of the policy implications of the Secretary's regulation. But awareness alone does not make for a "bad" judge; in fact it promotes good judging because it provides a judge with a way to understand what the statute means in context. Legal issues are also political ones. Justice Stevens made a good textual, legal argument in favor of the Secretary's regulation. He made law, just as the Secretary made it when he promulgated the regulation. When the ESA comes up for reauthorization, Congress will have an opportunity to make the law again, notwithstanding the Court's version.

CONCLUSION

Judges make law as judges make it. The argument over statutory interpretation is about how judges are to make law. This Note has shown the shortcomings of Justice Scalia's textualist position both as a theory of judging and as a theory of meaning. There will always be good and bad judges irrespective of method; textualism is no more likely to avoid the human subjective element that is judgment than is any other method of statutory interpretation. Nor is the meaning of language something that, like lost treasure, can simply be found. Judges do not find a law that is objective and somehow pre-determined. Nevertheless, although the textualist theory is flawed, it does advance, and has served to reinvigorate, the case for paying attention to the text. To the extent that textualism has brought reasonableness to methods of interpretation its effects are positive. However, to assert that the text is the only answer to statutory questions is an unreasonable position and if carried too far belittles the great law-making institution of the Supreme Court.

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133. *Id.* at 2425 (emphasis added).